IN THE

Supreme Court of the United States

October Term, 1978

No. 78-725

SOVEREIGN CONSTRUCTION COMPANY, LTD.,
Petitioner,

v.

CITY OF PHILADELPHIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HERMAN J. OBERT
GIBBONS, EUSTACE & OBERT
1442 Fidelity Building
Philadelphia, Pa. 19109
(215) 735-4868
Counsel for Petitioner

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON
EASTERN PENNSYLVANIA REPRESENTATIVE
THE PLAZA, SUITE 23F, PHILADELPHIA, PA. 19103
PHONE: (215) 568-7763

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Sovereign Construction Company, Ltd. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 8, 1978.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix "A" hereto. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 439 F.Supp. 692 (E.D. Pa. 1977), and appears in Appendix "B" hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on August 8, 1978. This petition was filed with 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Does the lowest responsive responsible bidder for construction of a Water Pollution Control Plant have standing to sue a City to obtain a Declaratory Judgment, Injunctive relief and a Mandatory Order requiring the City to award the construction contract to such low bidder where the Project is federally funded, pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1281-1293 (Supp. V. 1975), which the City has arbitrarily and capriciously refused to do?

Statutory Provisions and Regulations Involved

The following provisions of statutes of the United States and regulations of the Environmental Protection Agency are involved:

1. § 1281(a), § 1281(g) and § 1361(a) of Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1281-1293 (Supp. V. 1975). See Appendix C.

2. EPA Regulation, 40 CFR 35.936-2(a). See Appendix D.

   EPA Regulation, 40 CFR 35.936-3. See Appendix E.

   EPA Regulation, 40 CFR 35.936-16(a). See Appendix F.

Statement of the Case

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 because of the diversity of citizenship, the plaintiff being a citizen of the State of New Jersey and the defendant a citizen of the Commonwealth of Pennsylvania.

Sovereign in its Complaint also expressly asserted that its legal rights under Title II of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 33 U.S.C. § 1281 *et seq.* and under the EPA grant administration regulations had been violated by the City's actions.

The plaintiff in this proceeding and the Petitioner herein, Sovereign Construction Company Ltd. (Sovereign) brought suit against City of Philadelphia (City) for Declaratory Judgment, Injunctive relief, and Mandatory Order because of the City's rejection of Sovereign's bid for construction of a Preliminary Treatment Building for a Water Pollution Control Project (Project). The City advertised for bids for general construction. The Project is being seventy-five percent federally funded, pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1281-1293 (Supp. V 1975) [FWPCA] and is designated Federal Grant No. C-420681-02. Bids were open December 16, 1975 by the City's Procurement Department. There were nine bidders. Sovereign's bid in the amount of $20,779,100 (Bid) was the lowest bid received. It was $507,900 less than the second low bidder, and $939,000 below the estimate of the City's own Engineer. Because of an alleged "imbalance" in Sovereign's bid, the City sought to initiate action to rebid the Project. Sovereign, acting in accordance with the United States Environmental Protection Agency (EPA) regulations, secured the intervention of the EPA Regional Administrator for Region III, who advised the City that EPA grant regulations required the City to afford Sovereign an op-

portunity to express its views. Following a meeting between representatives of the City and Sovereign, the City's Procurement Commissioner on April 9, 1976 reaffirmed his initial decision to reject all bids and to "rebid" the project. Sovereign, pursuant to EPA regulations, requested the Regional Administrator to review the adverse determination. A hearing was thereafter held at which both Sovereign and the City presented their respective facts and positions. On December 6, 1976, a detailed written "Determination of Regional Administrator" was handed down. It reviewed the factual and technical background of the problem. The Regional Administrator sustained the protest of Sovereign and reversed the determination of the City to reject all bids.

Notwithstanding the Administrator's Determination, the City refused and continues to refuse to award Sovereign a contract for the construction work.

Sovereign filed its Complaint in the United States District Court for the Eastern District of Pennsylvania, alleging the action of the City Procurement Commissioner is arbitrary and capricious, violative of the Federal Water Pollution Control Act Amendments of 1972, of EPA regulations and the law of Pennsylvania. The prayer of the Complaint is for a Declaratory Judgment, Injunctive relief and a Mandatory Order requiring the City to award sovereign the contract for the Project.

The City filed an Answer. Subsequently it filed its Motion seeking, *inter alia*, judgment on the Pleadings.

The District Court granted the City's Motion for Judgment on the Pleadings holding, in sort, that Sovereign failed to state a claim (under either federal or Pennsylvania law) upon which relief could be granted. Judgment was so entered.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court.

Reasons for Granting the Writ

Grants from the federal government have been, and will continue to be a major source of funds for state and local governments. In a special analysis published by the Office of Management and Budget concerning federal aid to state and local governments it was estimated that under the government's 1979 budget, grants will probably account for about one-sixth of total federal spending—which will translate into over one-fourth of the funds expended by the state and local recipients of those grants—the grantees. Cities are expected to receive $55 billion in 1979, compared with $51 billion in 1978 and $44 billion in 1977. A substantial part of those sums of money will be for construction of public projects by state and local grantees.

The decision below presents a significant and recurring problem of national importance concerning the right of the lowest responsive responsible bidder to receive an award of a contract for construction of a project funded substantially by a grant of federal funds. The practice of withholding such an award from the lowest responsive responsible bidder is detrimental to the economics and national interest of our country. It creates a wasteful and inflationary impact which is detrimental not only to taxpayers but to every citizen.

In granting the City's Motion for Judgment on the Pleadings, the District Court implicitly held, and the Court of Appeals affirmed, that the City is immune from any legal action by the lowest responsive responsible bidder for construction of a project which is being funded substantially by federal grant funds, notwithstanding its bid has been arbitrarily and capriciously rejected.

Sovereign pleaded arbitrary and capricious rejection of its bid by the City through abuse of discretion. Such rejection is

admitted of record by the pleadings which govern disposition of the Motion for Judgment on the pleadings.

Arbitrary and capricious abuse of power does not merit immunity from and protection of law regardless of whether the aggrieved party is a taxpayer or a bidder on a public project—state or federal. That there are limitations to carte blanche toleration of arbitrary abuse of official power in instances involving federal grant funds, not dependent on taxpayer action, should be enunciated clearly in federal decisions, and at the highest level.

The Court of Appeals for the Third Circuit affirmed the District Court, holding Sovereign had failed to state a claim upon which relief could be granted. This petition for a Writ of Certiorari undertakes to present for consideration only the federal aspect of the legal rights to which Sovereign claims entitlement.

This petition affecting a successful bidder to a grantee of FWPCA funds is of precedential importance. It brings before this Court the case of a successful bidder for a construction project, substantially funded for a City grantee by FWPCA funds, which is being arbitrarily and capriciously denied the award of a contract to which the Regional Administrator has found it is entitled. Notwithstanding arbitrary and capricious action by the City, and a formal Determination by the Regional Administrator of Sovereign's right to an award of the contract for construction of the federal funded Project, the Court below held Sovereign has no standing or recourse under federal law to sue the City for enforcement of an award.

The Regional Administrator's Determination was favorable to Sovereign. Had Sovereign *not* prevailed before EPA, Sovereign would have recourse to the Federal District Court for remedial relief under the Administrative Procedure Act

(APA) and could prevail in that court. Paradoxically, since Sovereign did prevail before EPA and is a successful party in interest, it has been rendered legally impotent, in the same or any other court, to enforce observance of its legal rights. If a party whose cause *has not prevailed* before a government agency is accorded access to a federal court under the APA, it is inconceivable that a party whose cause *has prevailed* should be denied access to the same court for the protection of that cause—albeit not by proceeding under the procedure of the Administrative Procedure Act.

Sovereign pleaded the City's Federal Grant No. C-420681.02 as well as the FWPCA and pertinent EPA regulations as a basis for its cause of action in the federal Court for enforcement of its Bid. The Determination of the Regional Administrator has also been pleaded and is incorporated in Sovereign's Answer to the City Motion for Dismissal. The latter are replete with references to requirements of FWPCA and EPA regulations, and policy governing the obligations of Grantees relating to award of contracts, the enforcement of which Sovereign seeks in the federal Court. Sovereign has been found by EPA, an agency of the federal government, to have legal right to award of the contract. Certainly, even if only on the basis of diversity, the federal Court is the appropriate forum in which to enforce that right which the City is violating.

The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interest of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance. Arbitrary rejection of all bids has the inevitable effect of discouraging responsible bidders from dealing with the federal grantee and instead encourages the submission of tentative bids by less

responsible bidders the first time around to find out what one's competitors are bidding, with the knowledge that the grantee can and will reject all bids, and on the second time around the tentative bidder will know what his competition intends to bid. The adverse impact of such practice on a national scale discourages competitive bidding for projects which are being funded by federal grants involving many billions of dollars annually.

To counteract such damaging practice it is EPA policy to encourage and require free and open competition appropriate to the type of project work to be performed: 40 CFR § 35.936-3. The grantee is required to maintain a code or standard of conduct to govern the *performance* of its employees in the conduct of project work, including procurement and the expending of project funds, to avoid *noncompetitive* procurement *practices* which restrict or eliminate competition or otherwise restrain trade: 40 CFR § 35.936-16(a). The arbitrary rejection of a bid is certainly a noncompetitive procurement practice tending to restrict or eliminate competition or otherwise restrain trade, and a violation of express EPA regulations which implement the statute granting federal assistance.

A bidding contractor should be accorded opportunity to protect its interest in the competitive bidding system in which it is participating if that system is to be successful. It can succeed only if the participants in that system have access to judicial enforcement of an award when they are the lowest responsive responsible bidder.

Jurisdiction to conduct judicial review of Government *agency* action may be invoked by a bidder in the area of *direct federal procurement*. That now is an established rule of law. Why should a successful bidder on a federally funded project be precluded from invoking the Court's exercise of such jurisdiction?

Where a bidder on a contract under a federal grant does not receive a contract because the federal grantee does not follow federal regulations, the successful bidder is not less "aggrieved" than a bidder for a contract which is refused an award by the federal government making a direct procurement. There is no substantive difference between the injuries suffered by Sovereign as a successful bidder for a contract funded by federal grant and injuries suffered by a successful bidder unlawfully refused an award by federal procurement authorities.

Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (C.A. 3rd Cir. 1971) Cert. Den. 404 US 854, 92 S.Ct. 98, 30 L.Ed. 2d 95 (1971) lends support to the position that a contractor, as a bidder on a federally assisted construction project, has standing to sue, albeit in that case the contractor's interest was being impacted by an Executive Order mandating compliance with a hiring plan.

In *Association of Data Processing Services v. Camp*, 397 US 150, 90 S.Ct. 827, 25 L.Ed. 184 (1970), the Court outlined the two-step test for determining standing to sue—namely—will the challenged act cause claimant injury economically or otherwise, and, is the claimant interest within the zone protected by statute. Also, in *Barlow v. Collins*, 397 US 159, 90 S.Ct. 832, 25 L.Ed. 2d 192 (1970) it was held that the regulations issued under a statute must be considered in determining if an interest is "arguably" within the zone of interests to be protected by that statute.

Palpable economic injuries have long been recognized as sufficient to lay the basis for standing, *with or without a specific statutory provision* for judicial review: *Sierra Club v. Morton*, 405 US 727, 92 S.Ct. 1361, 31 L.Ed. 2d 636 (1972).

Conclusion

The Supreme Court of the United States is petitioned to decide the standing and legal right of the lowest responsible responsive bidder, which is being arbitrarily and capriciously denied the award of a public contract by the grantee of more than twenty million dollars of federal funds for construction of a FWPCA project. The federal granting agency, EPA, has determined that bidder, Sovereign, to be entitled to the award. An important public interest of national scope can be served by the grant of a Writ in this case.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

HERMAN J. OBERT,
GIBBONS, EUSTACE & OBERT,
1442 Fidelity Building,
Philadelphia, Pa. 19109,
(215) 735-4868,
Counsel for Petitioner.

APPENDIX "A"

Judgment Order—Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2613

SOVEREIGN CONSTRUCTION COMPANY, LTD.,
Appellant,

vs.

CITY OF PHILADELPHIA.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 77-739)

Argued
August 8, 1978
Before: ALDISERT, VAN DUSEN and HUNTER,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by The Honorable Alfred L. Luongo, 439 F. Supp. 692 (E.D. Pa. 1977), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

ALDISERT,
Circuit Judge.

Attest:

M. Elizabeth Ferguson
Acting Clerk

Dated: August 8, 1978

APPENDIX "B"

Opinion and Order—U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOVEREIGN CONSTRUCTION COMPANY, LTD.,

v.

CITY OF PHILADELPHIA.

CIVIL ACTION NO. 77-739

OPINION

Luongo, J. October 31, 1977

Plaintiff, Sovereign Construction Company, Ltd., brought this diversity action against the City of Philadelphia to resolve a dispute arising out of the City's handling of bids for construction work on the Preliminary Treatment Building at the City's Northeast Water Pollution Control Plant. As will appear from the statement of facts below, nearly two years have elapsed since the City received bids on the work in question. To date the City has not awarded a contract for this work to any bidder. Early construction of the Preliminary Treatment Building will clearly be in the public interest. Therefore, although I have carefully considered the arguments presented by both parties, I will issue only a brief opinion in order that the ultimate resolution of this controversy may be hastened.

The case is before me on the City's motion for judgment on the pleadings, Fed.R.Civ.P. 12(c), and so "all well-pleaded material allegations of the opposing party's pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false." 2A Moore's Federal Practice ¶ 12.15, at 2343 (2d ed. 1948) (collecting cases) (footnote omitted). With this background in mind, the essential facts of this case are as follows.

Pursuant to its published invitation for bids, the City, on December 16, 1975, received and opened nine bids, including one submitted by plaintiff, for work on the Preliminary Treatment Building. Complaint ¶¶ 7, 11. This project is seventy-five percent federally funded, pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1281-1293 (Supp. V 1975). Plaintiff's bid of $20,779,100 was the lowest bid received by the City. *Id.* ¶ 12. Because of an alleged "imbalance" in plaintiff's bid, the City then sought to "rebid" the project. Plaintiff secured the intervention of the EPA's Regional Administrator for Region III, who advised the City that EPA grant regulations required the City to afford plaintiff an opportunity to express its views. *See* 40 C.F.R. § 35.939(d) (1976). Following a meeting between the City and Sovereign, the City's Procurement Commissioner on April 9, 1976 reaffirmed his initial decision to reject all bids and to "rebid" the project. *Id.* ¶¶ 14-15. Sovereign again turned to the EPA for redress. On December 6, 1976, a detailed written "Determination of Regional Administrator"[1] was handed down. After considering and rejecting the City's argument that Pennsylvania law rather than federal law should govern the bid dispute,[2] the Regional Administrator concluded: "For the foregoing reasons I sustain the protest of Sovereign Construction Company, Ltd., and hereby reverse the determination of the City of Philadelphia to reject all bids." The EPA grant regulations preclude any further administrative appeal from this Determination. 40 C.F.R. § 35.939(e)(3) (1976). Notwithstanding the Administrator's Determination, "the City has refused and continues to refuse to award Sovereign a contract" for the construction work. Complaint ¶ 21.

[1] This appears in the record as Exhibit A to Plaintiff's Answer to Defendant's Motion.

[2] The City relied on 40 C.F.R. §§ 35.936-2 and 35.936-10(1976) in support of its position.

Sovereign filed this complaint on March 1, 1977, alleging that the City's actions are arbitrary and capricious, violative of the Federal Water Pollution Control Act Amendments of 1972, violative of EPA regulations, violative of Pennsylvania law, and an abuse of discretion, and seeking an order requiring the City to award it the contract for the Preliminary Treatment Building. *Id.* ¶¶ 26, 33. The City filed an answer, and subsequently filed this motion seeking, *inter alia,* judgment on the pleadings.

In their memoranda of law, the parties focus on the "well-settled rule" of Pennsylvania law that an unsuccessful bidder may not sue to secure an award of the disputed contract. *Weber v. Philadelphia,* 437 Pa. 179, 181 n.2, 262 A.2d 297, 299 (1970) (separate footnote of Jones, J.); *see, e.g., Pullman, Inc. v. Volpe,* 397 F. Supp. 432, 442 (E.D. Pa. 1971). Plaintiff seeks to circumvent this rule by (1) restating it as a rule of standing, and (2) arguing that the federal law of standing should control in this case. To this end, plaintiff relies on such decisions as *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859, 861-73 (D.C. 1970), and *Darin & Armstrong, Inc. v. United States Environmental Protection Agency,* 431 F. Supp. 456 (N.D. Ohio), *vacated mem. and remanded,* 542 F.2d 1175 (6th Cir. 1976),

which involved standing to sue in federal-question cases under the Administrative Procedure Act. These decisions do not aid plaintiff, however, because the Pennsylvania rule adverted to earlier is not only a rule of standing, but also a rule of substantive law. As stated in one recent opinion of the Pennsylvania Supreme Court, the rule is that "a disappointed bidder has sustained no personal injury which entitles him to redress in court." *R.S. Noonan, Inc. v. York School Dist.*, 400 Pa. 391, 394, 162 A.2d 623, 625 (1960), *quoted with approval in Weber v. Philadelphia*, 437 Pa. 179, 181 n.2, 262 A.2d 297, 299 (1970) (separate footnote of Jones, J.). In short, a disappointed bidder has no cause of action under Pennsylvania law. *Accord, Commonwealth ex rel. Snyder v. Mitchell*, 82 Pa. 343, 350-51 (1876) (alternative holding). Accordingly, plaintiff could not prevail on a state law theory even if I were to determine that plaintiff has standing in this case. I therefore need not decide whether state or federal law controls on the issue of "prudential" standing in this diversity case. *See generally Hanna v. Plumer*, 380 U.S. 460 (1965); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Plaintiff also seeks to avoid this rule of law through the following argument:

> "Plaintiff is not suing as a disappointed bidder. It sues to preserve its legal right as the lowest responsible bidder on a federal funded construction project entitled, by federal and state law to an award of the contract, and so determined to be by the Environmental Protection Agency. Plaintiff sues for an award of that contract which is being denied to it by the defendant, acting by and through its Procurement Commissioner, who has by an abuse of discretion and for divers other reasons, arbitrarily and capriciously refused to award a contract to Sovereign for construction of the Project." Plaintiff's Memorandum of Law Contra Defendant's Motion, at 2.

As I understand it, the argument is that a bidder who is legally entitled to the award of a contract and is wrongfully denied that award cannot be viewed as a "disappointed bidder," because that term applies only to a bidder who (1) is *not* the lowest responsible bidder, and (2) is therefore not awarded the contract, Plaintiff's restrictive interpretation of the term "disappointed bidder" is at odds, however, with the interpretation given that term by the Pennsylvania Supreme Court. In *R.S. Noonan, Inc. v. York School District*, 400 Pa. 391, 162 A.2d 623 (1960), for example, the court considered a dispute growing out of the District's invitation for competitive bids on the construction of a new school building. Plaintiff, Noonan, Inc., was the lowest bidder on the project. The District then rejected all bids, solicited new bids, and awarded the contract to another firm that submitted the lowest bid on the second round. Noonan, Inc., alleging that the District "was guilty of bad faith, arbitrary action, and abuse of discretion in rejecting its bid," sought an order that the contract be awarded to it instead. 400 Pa. at 393, 162 A.2d at 624. Justice Musmanno's opinion for the court stated the controlling principle in this fashion: "As early as 1876, this Court held . . . that a disappointed bidder has sustained no personal injury which entitles him to redress in court." 400 Pa. at 394, 162 A.2d 625. Justice Musmanno's discussion of *Heilig Bros. Co. v. Kohler*, 366 Pa. 72, 76 A.2d 613 (1950), also confirms that the term "disappointed bidder" embraces any unsuccessful bidder, *i.e.*, any bidder who was not awarded the contract at issue. *See Highway Express Lines, Inc. v. Winter*, 414 Pa. 340, 346, 200 A.2d 300, 303 (1964) (by implication).

The unavoidable conclusion is that Sovereign Construction Company is here as a disappointed bidder; Sovereign therefore has no cause of action against the City under Pennsylvania law.

Sovereign also asserts that its legal rights under the Federal Water Pollution Control Act Amendments of 1972 and under the EPA grant administration regulations have been violated by the City's actions. Sovereign points to no specific regulation or statutory provision as the source of its federal cause(s) of action, and, indeed, has not invoked this court's federal-question jurisdiction. I have examined the 1972 Amendments in light of *Cort v. Ash*, 422 U.S. 66 (1975), and I have concluded that no private right of action in a disappointed bidder may be implied from the Amendments. In *Cort*, the Supreme Court stated:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78 (citations omitted).

These four factors may be applied to the 1972 Amendments in a straightforward fashion. First, the 1,766-page legislative

history is utterly devoid of any indication that Congress enacted Title II of the Amendments for the *especial* benefit of private contractors working on projects funded under that title. *See* Senate Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1971, S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971); House Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 92-911, 92d Cong., 2d Sess. (1972).[3] Second, although the legislative history does not address this issue, the absence from the Amendments' broad provision on citizen suits of any colorable authorization for a private right of action in a disappointed bidder gives rise to an inference that Congress did not intend to create such a right. *See* 33 U.S.C. § 1365 (Supp. IV 1974). Third, the purpose of Title II—the development of treatment works that will satisfy the Amendments' very rigorous timetable for pollution reduction[4]—would almost certainly be frustrated by the creation of an additional[5] avenue of review of grantees' bid decisions, for such review could work to delay the construction of a treatment plant while a disappointed bidder pursued his remedies. Fourth, a federal right of action against a state or municipal grantee would be anomalous, if not inappropriate, since state and municipal contracts have traditionally been governed by state law. Although contracts funded in part by the federal government under Title II of the Amendments are not traditional contracts, I am not persuaded that the injection of

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[3] Both the House and the Senate reports are reprinted in Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print 1973).

[4] *See* 33 U.S.C. § 1281(a) (Supp. IV 1974); *id.* § 1251(a) (Supp. IV 1974).

[5] *See* 40 C.F.R. §§ 35.939, 35.965 (1976).

federal dollars into a contract between a city and the low bidder requires all issues of procurement law that arise out of that contract to be determined by federal law, absent a federal statute or regulation that expressly or impliedly requires such a result. Thus, upon consideration of the four *Cort v. Ash* factors, I conclude that no private right of action in a disappointed bidder may be implied from the 1972 Amendments.

Any argument that the EPA grant regulations themselves support an implied private right of action runs up against (1) the question whether the EPA has the power to create by regulation a new cause of action, and (2) the enforcement provision of the EPA grant regulations, which spells out various sanctions (not including actions by bidders) to be imposed on an uncooperative grantee.[6] As the second issue is dispositive, I need not address the first. The enforcement provision of the EPA regulations, set out in note 6, *supra*, clearly contemplates that the Regional Administrator alone shall determine what sanctions, if any, are to be imposed on a grantee for noncompliance with other EPA regulations. Moreover, the regulation does not purport to expand the range of available judicial remedies; rather, it states that the Regional Administrator may, if he deems it "appropriate," pursue such remedies. In short, part 35 of the EPA regulations affords no basis for implying a private right of action in a disappointed bidder.

[6] The enforcement provision of the EPA regulations is as follows:

"§ 35.965 *Enforcement.*

Noncompliance with the provisions of this subpart shall be cause for any one or more of the following sanctions, a determined appropriate by the Regional Administrator:

(Footnote continued on following page)

Sovereign in effect seeks enforcement of the Regional Administrator's Determination in its favor. It therefore cannot rely on the Administrative Procedure Act for its cause of action, as Sovereign is plainly not "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1970), *as amended by* Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721. Absent a statutory provision giving Sovereign an express or implied right of action, I have no authority to "enforce" the Regional Administrator's Determination against the City.

As a practical matter, the EPA will undoubtedly have the final word in this matter, inasmuch as a federal grant is providing seventy-five percent of the funds needed to com-

(Footnote continued from preceding page)

(a) The grant may be terminated or annulled pursuant to § 30.920 of this subchapter;

(b) Project costs directly related to the noncompliance may be disallowed;

(c) Payment otherwise due to the grantee of up to ten percent (10%) may be withheld (see § 30.615-3 of this subchapter);

(d) Project work may be suspended pursuant to § 30.915 of this subchapter;

(e) A noncomplying grantee may be found nonresponsible or ineligible for future Federal assistance or a noncomplying contractor may be found nonresponsible or ineligible for approval for future contract award under EPA grants;

(f) An injunction may be entered or other equitable relief afforded by a court of appropriate jurisdiction;

(g) Such other administrative or judicial action may be instituted as may be legally available and appropriate."

plete the Preliminary Treatment Building. The Regional Administrator may decide that the City's actions warrant the imposition of one or more of the sanctions listed in the EPA grant administration regulations, 40 C.F.R. § 35.965 (1976). From Sovereign's perspective, this potential administrative enforcement is understandably less satisfactory than prompt injunctive relief. Furthermore, from the standpoint of the public interest in reducing or eliminating water pollution, early construction of the Preliminary Treatment Building is of the utmost importance. I cannot, however, recognize a private right of action where neither Congress nor the EPA has done so.

Because Sovereign has failed to state a claim (under either federal or Pennsylvania law) upon which relief can be granted, the City is entitled to judgment in its favor. The City's motion for judgment on the pleadings will be granted, and judgment will be entered for the City. *See* Fed.R.Civ.P. 12(h)(2).

ALFRED L. LUONGO,
J.

Order

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SOVEREIGN CONSTRUCTION COMPANY, LTD.,

v.

CITY OF PHILADELPHIA.

CIVIL ACTION NO. 77-739

This 31st day of October, 1977, it is

ORDERED that the Motion of defendant, City of Philadelphia, for Judgment on the Pleadings is GRANTED.

ALFRED L. LUONGO,
J.

APPENDIX "C"

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1281(a) and (g) (1); § 1361(a)

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 U. S. C. §§ 1281-1293 (Supp. V. 1975)

SUBCHAPTER II—GRANTS FOR CONSTRUCTION OF TREATMENT WORKS

§ 1281. *Congressional declaration of purpose*

(a) It is the purpose of this subchapter to require and to assist the development and implementation of waste treatment management plans and practices which will achieve the goals of this chapter.

*
*
*

(g)(1) The Administrator is authorized to make grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works.

*
*
*

SUBCHAPTER V—GENERAL PROVISIONS

§ 1361. *Administration—Authority of Administrator to prescribe regulations*

(a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

Appendix "E"—Environmental Protection Agency Regulation 40 CFR §35.936-3 Competition.

APPENDIX "D"

Environmental Protection Agency Regulation 40 CFR § 35.936-2 Grantee Procurement Systems; State or local law

40 CFR—ENVIRONMENTAL PROTECTION AGENCY RULES AND REGULATIONS

PART 35—STATE AND LOCAL ASSISTANCE

Procurement Under Grants For Construction of Treatment Works

40 CFR § 35.936-2 *Grantee Procurement Systems; State or local law.*

(a) Grantees may use their own procurement systems and procedures which meet applicable requirements of State, territorial or local laws and ordinances to the extent that such systems and procedures do not conflict with minimum requirements set forth in this subchapter.

APPENDIX "E"

Environmental Protection Agency Regulation 40 CFR § 35.936-3 Competition

40 CFR—ENVIRONMENTAL PROTECTION AGENCY RULES AND REGULATIONS

PART 35—STATE AND LOCAL ASSISTANCE

40 CFR § 35.936-3. *Competition.*

It is the policy of the Environmental Protection Agency to encourage free and open competition appropriate to the type of project work to be performed.

APPENDIX "F"

Environmental Protection Agency Regulation
40 CFR § 35.936-16 Code or standards of conduct

40 CFR—ENVIRONMENTAL PROTECTION AGENCY
RULES AND REGULATIONS

PART 35—STATE AND LOCAL ASSISTANCE

40 CFR § 35.936-16 *Code or standards of conduct.*

(a) The grantee must maintain a code or standards of conduct which shall govern the performance of its officers, employees, or agents in the conduct of project work, including procurement and the expending of project funds. The grantee's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors or potential contractors. The grantee must avoid personal or organizational conflicts of interest or non-competitive procurement practices which restrict or eliminate competition or otherwise restrain trade.